NO. 91-1278

Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

DR. MARK FELDMAN, PRO SE,

Petitioner,

vs.

STEPHEN GLUCROFT, M.D., STEPHEN GLUCROFT, M.D., P.A., JOEL DENNIS, M.D., JOEL DENNIS, M.D., P.A., LLOYD MORIBER, M.D., LLOYD MORIBER, M.D., P.A., MELVYN DRUCKER, M.D., MELVYN DRUCKER M.D., P.A., KENNETH HODOR, M.D., KENNETH HODOR, M.D., P.A., ROBERT S. ENNIS, M.D., ROBERT S. ENNIS, M.D., P.A., HUGH UNGER, M.D., HUGH UNGER, M.D., P.A., and ORTHOPEDIC ASSOCIATES, P.A.,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THIS COURT HAS JURISDICTION UNDER 28 U.S.C. §1257(a) TO REVIEW A STATE COURT JUDGMENT BASED SOLELY ON INDEPENDENT STATE LAW GROUNDS WHEN THE STATE COURT DID NOT RULE UPON ANY FEDERAL QUESTIONS OF LAW OR DRAW INTO QUESTION THE VALIDITY OF ANY STATE STATUTE ON THE GROUND OF ITS BEING REPUGNANT TO THE CONSTITUTION OR LAWS OF THE UNITED STATES

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STATEMENT OF THE CASE

Petitioner Mark Feldman's ("Feldman") petition for writ of certiorari mischaracterizes the proceedings and the evidence presented below. Therefore, Respondents Stephen Glucroft, M.D., Joel Dennis, M.D., Lloyd Moriber, M.D., Melvyn Drucker, M.D., Kenneth Hodor, M.D., Robert Ennis, M.D., Hugh Unger, M.D., and Orthopedic Associates, P.A. ("Respondents")[1] provide this Statement of the Case.

A brief summary of the protracted history of this case is necessary for the Court's understanding of why it has no jurisdiction to grant a writ of certiorari. This case involves Feldman's failure in the Florida state trial court, on remand from the Supreme Court of Florida, *Feldman v. Glucroft,* 522 So.2d 798 (Fla. 1988) ["*Feldman II*"], to allege and offer any "extrinsic evidence of malice or fraud" sufficient to overcome the Florida qualified statutory privilege for medical review committee proceedings and records afforded by Section 768.40(4), Florida Statutes (1983). *Feldman v. Glucroft,* 580 So.2d 866 (Fla. 3d DCA 1991) ["*Feldman III*"].

Feldman filed his initial complaint in this action on March 8, 1984. A summary judgment was entered against Feldman on May 7, 1985, pursuant to Florida Rule of Civil Procedure ("Fla.R.Civ.P.") 1.510. Feldman appealed that summary judgment to the Third District Court of Appeal of Florida, which affirmed, *Feldman v. Glucroft,* 488 So.2d 574 (Fla. 3d DCA 1986) ["*Feldman I*"], but certified two questions to the Supreme Court of Florida: "(1) Does section 768.40(4) totally abolish a defamation claim arising in proceedings before medical review

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[1] Feldman named the professional associations of the various respondents (included once again in his style of this case) as parties to the Second Amended Complaint, but failed to serve them with process. They were dismissed from the action by the Circuit Court, and are not proper parties hereto.

committees?" and "(2) If so, is section 768.40(4) invalid as in conflict with Article I, section 21, Florida Constitution?" *Id.* at 575. The Supreme Court of Florida considered the certified questions, and held that Section 768.40 did not completely abolish a defamation claim arising out of a medical peer review proceeding,[2] and accordingly, did not violate the "access to courts" provision of the Florida Constitution, Art. I, § 21. The Supreme Court of Florida did not address any federal issues. The Supreme Court of Florida remanded the case for the sole purpose of permitting Feldman an opportunity to allege and prove extrinsic evidence of malice or fraud sufficient to overcome the Florida qualified privilege set forth in the statute. *Feldman II*, at 801.

On October 8, 1988, purporting to act pursuant to the mandate of the Supreme Court of Florida, Feldman filed a Second Amended Complaint. (Petitioner's Appendix E). This Second Amended Complaint failed to allege extrinsic evidence of malice or fraud sufficient to overcome the statutory privilege. Respondents thereafter filed a motion for final summary judgment. After hearing, the Circuit Court entered final judgment for Respondents, finding that Feldman had "put forth only the privileged matters from the peer review committee proceedings" and in any case the claim was barred by the applicable Florida statute of limitations, Section 95.11(3)(o), Florida Statutes (1983).

On appeal, the Third District Court of Appeal of Florida affirmed the Circuit Court's summary final judgment on the grounds that Feldman failed to come forward with extrinsic evidence of malice or fraud sufficient to overcome the Florida statutory privilege. *Feldman III*, 580 So.2d at 867. Feldman then filed a Motion for Rehearing which was denied. On November 5,

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[2] "We find the 1983 statute, rather than totally abolishing the cause of action, adds an additional restriction to this cause of action." *Feldman II*, 522 So.2d at 799.

1991, the Supreme Court of Florida declined to accept jurisdiction of the case and denied Feldman's petition for review.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to grant a writ of certiorari because the state court did not consider or rule upon any federal law questions. The Third District Court of Appeal of Florida affirmed the summary judgment entered against Petitioner by the state circuit court solely on state law grounds. Because no federal claim was preserved or considered below, Petitioner has no basis for seeking certiorari in this case.

The decision of the Third District Court of Appeal of Florida was based on adequate, independent state law grounds.

ARGUMENT

I. THE COURT HAS NO JURISDICTION OVER THIS CASE BECAUSE NO FEDERAL CONSTITUTIONAL ISSUES WERE RULED UPON BY THE STATE COURT BELOW

The question presented to this Court by Petitioner is whether the Fourteenth Amendment of the United States Constitution permits a state to grant a qualified tort immunity to hospital peer review proceedings. In presenting this query to the Court, Petitioner raises, for the first time on appeal, a denial of due process claim based on the Fourteenth Amendment to the United States Constitution.[3] This Court has no jurisdiction to consider this case as that issue was not addressed below and did not serve as the

[3] Petitioner has previously asserted constitutional claims based upon Article I, Section 9 of the Florida Constitution, which the Third District Court of Appeal of Florida previously found had been "abandoned" or were "totally unconvincing." *Feldman I*, 488 So.2d at 574-75 nn.1-2. Feldman did not preserve either the due process or the equal protection claims in his appeal in *Feldman II*.

basis for the decision of the Third District Court of Appeal of Florida.[4]

This Court has repeatedly held that it will not decide federal constitutional issues that were not raised, preserved or ruled upon in the state court proceedings below. *Webb v. Webb,* 451 U.S. 493, 498-99 (1981); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). Petitioner's brief on appeal to the Third District Court of Appeal of Florida made no meaningful argument that his Fourteenth Amendment due process rights were violated by virtue of the lower court's interpretation and application of the qualified tort immunity statute, Fla. Stat. §768.40(4) (1983). In the state court proceedings, Petitioner's arguments with regard to deprivations of due process were based on state law provisions, Fla. Stat. §768.40(4), hospital bylaws, and the Florida Constitution. Petitioner's objection to a state supreme court's application of a state law does not raise a federal question appropriate for review by this Court. *Agins v. City of Tiburon,* 447 U.S. 255, 259-60 n.6 (1980).

Petitioner made only a passing reference to the equal protection clause of the United States Constitution in his brief to the Third District Court of Appeal of Florida, and did not specifically mention the Fourteenth Amendment:

> Upholding these statutes [395.0115(5) and 768.40(6)] offends Article I section 9, Due Process, Article I section 21, Access to the Courts, and the Equal Protection clause of the Florida and United States Constitutions.

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[4] Feldman appeals from the decision of the Supreme Court of Florida. However, in instances such as this where the supreme court of a state denies review of the decision, the lower court rendering the decision, in this case the Third District Court of Appeal of Florida, becomes the highest court of the state for purposes of this Court's jurisdiction pursuant to 28 U.S.C. 1257(a). See *Randall v. Board of Comm'rs.,* 261 U.S. 252, 252-53 (1923); *Cuyahoga River Power Co. v. Northern Realty Co.,* 244 U.S. 300, 302 (1916).

(Appellant's Initial Brief on Appeal, p. 20). The referenced statutory provisions regulate the posting of a bond in connection with an action brought under the peer review immunity statutes, and were not discussed in the context of whether the application of Section 768.40(4), constituted a due process violation under the Fourteenth Amendment.

In *Webb v. Webb,* 451 U.S. 493 (1981), Petitioner sought certiorari by attempting to raise a federal claim under the Full Faith and Credit Clause, Art. IV, § 1 of the United States Constitution, which she had never raised or preserved in the state courts. *Id.* at 496. Petitioner's assertion that a federal claim had been properly raised below was not refuted by the respondent in his brief in opposition to certiorari. When it became clear to the Court, however, that the federal question had not been raised below, the Court dismissed the petition, and explained:

> Although Petitioner did use the phrase "full faith and credit" at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution.
>
> * * *
>
> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655, 17 S.Ct. 709, 711, 41 L.Ed. 1149 (1897). Petitioner argues that since the Georgia Constitution has no full faith and credit clause, there can be no doubt that the above references in the record were to the Federal Constitution and therefore that her federal claim was properly presented. . . We are unpersuaded. In fact, we find it far more likely that Petitioner was referring to state law.

451 U.S. at 496-97.

Petitioner here, having failed to bring before the Court below for decision a claim grounded upon the Fourteenth Amendment, cannot now bring this federal provision to the forefront as the primary consideration for this Court. No federal claim was adequately presented in the state proceedings, nor was one the basis of the lower courts' rulings.

In *Cardinale v. Louisiana,* 394 U.S. 437 (1969), the Court stated that

> the Judiciary Act of 1789 . . . vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If *both* of these do not appear on the record, the appellate jurisdiction fails. . . The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . . (citations omitted).

394 U.S. 438. (emphasis added).

The opinion of the Third District Court of Appeal of Florida in *Feldman III* does not pass upon any federal due process claim, but rather upholds the decision of the trial court based solely upon the propriety of the summary judgment entered pursuant to Florida Rule of Civil Procedure 1.510:

> Feldman failed to allege the existence of the requisite extrinsic evidence to overcome the statutory privilege afforded defendants. § 768.40, Fla. Stat. (1983). The documents attached to the amended complaint were either privileged committee documents or did not demonstrate malice or fraud. Defendants were therefore entitled to judgment as a matter of law.

580 So.2d at 867.

No federal claim was preserved or ruled upon below, either expressly or by clear implication. This "omission was due to want of proper presentation in the state courts," and the petition for

writ of certiorari should therefore be denied. *Webb*, 451 U.S. at 495.

II. THE DECISION BELOW WAS BASED SOLELY ON INDEPENDENT STATE LAW GROUNDS

Feldman's petition does not present a federal due process issue. Rather, Petitioner in effect asks this Court to review the state court's interpretation and application of Florida law and the Florida Rules of Civil Procedure. That request is not a proper basis for certiorari review by this Court. *Agins v. City of Tiburon,* 447 U.S. 255 (1980).

Petitioner's claim that he has been denied access to the courts and due process of law by virtue of Fla. Stat. § 768.40(4) (1983) is purely a question of Florida state law and procedure. In *Feldman v. Glucroft,* 522 So.2d 798, 799 (1988), the Supreme Court of Florida held that § 768.40(4) did not totally abolish a defamation claim based upon proceedings before medical review committees. The Court vacated the prior summary judgment entered against Feldman and remanded to allow Feldman an opportunity to file an amended complaint "to allege extrinsic malice or fraud." *Id.* at 801.

The *Feldman II* Court reasoned that the Legislature of the State of Florida "had a clear public need and justifiable basis for creating this limited restriction in the area of health care." *Id.* at 800, citing to *Holly v. Auld,* 450 So.2d 217, 219-20 (Fla. 1984):

> Inevitably, such a discovery privilege will impinge upon the rights of some civil litigants to discovery of information which might be helpful, or even essential, to their causes. We must assume that the legislature balanced this potential detriment against the potential for health care cost containment offered by effective self-policing by the medical community and found the latter to be of greater weight.

522 So.2d at 800-01.

The Third District Court of Appeal of Florida looked to the *Feldman II* opinion for guidance and held that summary judgment had been properly entered. The decision of this court was founded solely upon independent state law principles, Petitioner's failure to "allege the existence of the requisite evidence to overcome the statutory privilege" afforded Respondents by Fla. Stat., § 768.40 (1983). *Feldman III,* 580 So.2d at 867.

Where it is clear that the state court decision was based on bona fide separate, adequate and independent state grounds, this Court should not undertake to review the decision. *Jankovich v. Indiana Toll Road Comm'n.,* 379 U.S. 487 (1965). Even if the state court judgment had rested on both federal and state court grounds, this Court does not have jurisdiction if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Coleman v. Thomson,* __ U.S. __, 111 S.Ct. 2546 (1991). This rule applies regardless of whether the state law is substantive or procedural. *Id.* at 2554. *Accord Henry v. State of Mississippi,* 379 U.S. 443, 446 (1965). In his petition for writ of certiorari, Petitioner has failed to demonstrate that the decision of the state court was based on anything other than an adequate and independent state court ground.

CONCLUSION

For the foregoing reasons, Feldman's petition for writ of certiorari to the District Court of Appeal of Florida, Third District, should be denied.

Respectfully submitted,

/s/ DAN PAUL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 4th day of March, 1992 to: Mark Feldman, 15529 Bull Run Road, Miami Lakes, Florida 33014

/s/ DAN PAUL